RNI No. MAHBIL /2009/31744
Reg. No. MH/MR/South-318/2013-15

सत्यमेव जयते

महाराष्ट्र शासन राजपत्र

भाग एक–ल

वर्ष ६, अंक २९] गुरुवार ते बुधवार, ऑक्टोबर २-८, २०१४/आश्विन १०-१६, शके १९३६ [पृष्ठे २४, किंमत : रुपये २३.००

प्राधिकृत प्रकाशन

(केंद्रीय) औद्योगिक विवाद अधिनियम व मुंबई औद्योगिक संबंध अधिनियम यांखालील (भाग एक, चार-अ, चार-ब आणि चार-क यांमध्ये प्रसिद्ध केलेल्या अधिसूचना, आदेश व निवाडे यांव्यतिरिक्त) अधिसूचना, आदेश व निवाडे.

IN THE INDUSTRIAL COURT, AT MUMBAI

REVISION APPLICATION (ULP) No. 173 OF 2001 IN COMPLAINT (ULP) No. 626 OF 1997.—(1) Maharashtra State Road Transport Corporation, Kirol, Vidyavihar, Mumbai 400 086—*Applicant—Versus.*—Shri. Uttam Narayan Kashid, Ratnakar Mhatre Chawl No. 22, Room No. 2, Mankhurd, Mumbai 400 088.—*Opponent.*

In the matter of revision application under Sec. 44 of the M.R.T.U. and P.U.L.P. Act, 1971 against the order dated 28th September 2001 passed by VIIth Labour Court, Mumbai in Complaint (ULP) No. 626 of 1997.

Present.— Shri P. P. PATIL, Member, Industrial Court, Mumbai.

Appearances.— Shri B. K. Hegade, Advocate for Applicant,
Shri S. A. Khanolkar, Advocate for Opponent.

Judgment and order

(Dated 15th September 2003)

1. By this revision, the Applicant Corporation is challenging the order dated 28th September 2001 passed by VIIth Labour Court, Mumbai in Complaint (ULP) No. 626 of 1997 on various grounds as stated in the memo of revision.

2. The facts in brief of the revision are as follows. The Opponent (original Complainant) was in the employment of the Applicant Corporation as a driver. The Opponent was discharging his duties as driver on the route Dapoli of Bombay and near the village Talavali the said bus met with an accident. The accident was occured due to the defects in brakes. The Opponent's right leg was fractured for which he took medical treatment in various hospitals and also undergone surgery of his right leg. He was referred to the J. J. Hospital Medical Board. After examining by the Medical Board of J. J. Hospitals, declared him unfit for the post of driver with effect from 19th March 1997 and recommended to give him light duty. But the Applicant has not taken any cognizance of the advice of the Medical Board and without issuing a charge sheet or initiating enquiry terminated the services of the Opponent with effect from 19th March 1997. The penalty of Rs. 15,000 was also imposed against the Opponent and started recovery

proceedings. Despite of several representations made by the Opponent for giving him alternate job, no proper steps were taken by the Applicant. Terminating the serivces of the Opponent without issuing any chargesheet or enquiry and imposing penalty of Rs. 15,000 and recovering it amounts to unfair labour practices, therefore, the Opponent filed Complaint (ULP) No. 626 of 1997 under items 1(a), (b), (c), (f), and (g) of Sch. IV of the M.R.T.U. and P.U.L.P. Act.

3. The Applicant Corporation strongly opposed the allegations made against them of indulging in unfair labour practices covered under items 1(a), (b), (c), (f) and (g) of Sch. IV of the said Act because it was not a termination by way of victimization in colourable exercise of employer's right or on patently false reasons in uttar disregard with the principles of natural justice in the conduct of domestic enquiry and no question of describing punishment of shockingly disproportionate. It is contended by the Applicant that the Opponent was driving the bus in rash and negligent manner which resulted into met with an accident and caused damanged of rupees on lac to the Applicant Corporation as well as they have to pay compensation to the passengers. According to the Opponent, it is a simple termination of service of the Opponent because he found medically unfit to discharge the duty as driver. Therefore, no question of indulging in unfair labour practice lastly contended by the Applicant that giving an alternate job is sole discretion of the Corporation (Applicant) and as there was no vacancy, the representation of the Opponent was not considered for alternate light job.

4. After having been heard the parties, the learned Labour Judge was pleased to allow the complaint by order dated 28th September 2001 declaring the Applicant Corporation indulging in unfair labour practice under item 1(b) of Sch. IV of the M.R.T.U. and P.U.L.P. Act and directed them to reinstate the Opponent in continuity of service in the same grade and give him alternate work and pay full back wages. The said order is impugned in the present revision.

5. According to the Applicant, the order passed by the learned Labour Judge is without application of mind and the finding given is *ex-facie* illegal without any basis, therefore, the said impugned order is liable to be quashed and set aside.

6. Heard the learned Advocates for the Applicant Corporation as well as the Opponent.

7. The following points arise for my determination :—

Points.—	*Findings.*—
1. Whether the Applicant has proved that the order dated 28th September, 2001 passed by the VIIth Labour Court, Mumbai, in complaint (ULP) No. 626 of 1997 is illegal, arbitrary, perverse and hence liable to be quashed and set aside ?	No.
2. What orders ?	Revision Application is dismissed.

Reasons

8. In view of the serous objection raised by the Applicant Corporation to the maintainability of the complaint, it become necessary to go through the provisions of Item 1 of Sch. IV of the M.R.T.U. and P.U.L.P. Act. Sch. IV is explaining general unfair labour practices on the part of the employers. Item 1 of Sch. IV gives the instances under what the employer's unfair labour practice is covered while discharging or dismissing employees either by way of victimization, not in good faith but in colourable exercise of employer's right or falsely implicating an employee in a criminal case or for patently false reason in utter disregard of the principles of natural justice in the conduct of domestic enquiry etc. Undisputedly, the reason of termination of services of the Opponent is that he found medically unfit as per the certificate issued by the Medical Board. According to the Applicant, they are not engaged in any unfair labour practices as alleged, because the Opponent himself is not in a position to discharge his duty as driver and also declared by the Medical Board that he is unfit to work as driver, therefore, the question of engaging in unfair labour practice by the Applicant does not arise. Even on plain

reading of the provision of Item 1 of Sch. IV of the said Act, it is clear that sub clauses (*a*), (*c*), (*e*), (*f*) and (g) are not attracted because the termination of service is not either by way of victimization or for patently false reasons or implicating the Opponent in a criminal case or in utter disregard of the principles of natural justice in the conduct of domestic enquiry. While parting with the complaint, the learned Labour Judge has come to conclusion that the termination of service of the Opponent was not in good faith but it is in colourable exercise of the employer's right, therefore, to that effect given declaration that the Applicant Corporation indulged in unfair labour practices covered under item 1(b) of Sch. IV of the M.R.T.U. and P.U.L.P. Act. Because the Opponent was aggrieved with the said action of the Applicant of termination of his services, the complaint is filed challenging the action under item 1 of Sch. IV of the M.R.T.U. and P.U.L.P. Act.

9. The Opponent has examined himself in support of the facts stated in the complaint, but the Applicant Corporation declined to lead oral evidence as per the purshis Exh. C-10. Thus the only material before the learned labour Judge was the oral evidence of the Opponent, the Medical Board's certificate which is not under challenge. The major and crutial point for consideration before the learned labour Judge was as to whether the Opponent was entitled to for light duty by way of alternative job as he was declared medically unfit by the Board to discharge the duties as driver. After examining the Opponent, the Medical Board has opined that the Opponent has permanent disability at more than 40 percent therefore should not continue to work as driver and be considered for alternative light duty. As per advice of the Medical Board, the Opponent is claiming that he is entitled for light duty by way of alternative job. The Opponent though examined himself as witness but failed to prove the contents of the documents filed by him. Heavily reliance is placed by the Opponent on the letter dated 17th July 1997 sent by Maharashtra State Transport Kamgar Sanghatana to the Applicant Corporation with a request to give alternate job to the Opponent. In the said letter, it is specifically mentioned and referred clause 14 of the Settlement 1985 between the Union and the Applicant Corporation which relates that an employee becomes medically unfit to do the same job while discharging duties and entitled for alternate job. During the course of arguments, the learned Advocate for the Opponent has invited attention of this Court to the letter referred to above *i.e.* dated 17th July 1997. It seems from the observations and findings of the learned labour Judge that the parties failed to bring to the notice about clause 14 of the agreement of 1985 between the Union and the Applicant Corporation, which is mentioned in the letter dated 17th July 1997. The learned Advocate for the Applicant Corporation has streneously argued that a copy of the settlement of 1985 is not placed on record by the Opponent, therefore, cannot take advantage of the said letter dated 17th July 1997. The learned Advocate for the Applicant has invited attention of the Court to the observations made by the learned Labour Judge in his judgement in para 8 about unfair labour practices covered under item 1(a), (b), (c), (d) and (f) of Sch. IV of the Act and on the basis of the said observations trying to convince as to how the learned Labour Judge without application of mind considered and granted the relief in favour of the Opponent. It is pertinent to note that the learned Labour Judge though discussed and observed in para 8 of his judgement about unfair labour practices covered under items 1(a), (b), (c), (d) and (f) of Sch. IV of the Act, but while granting final relief, unfair labour practice covered under item 1(b) of Sch. IV is considered, it means rest of the unfair labour practices as alleged by the Opponent seems to be turned down by the learned Labour Judge. Having been considered the oral and documentary evidence, the learned Labour Judge has come to conclusion that the Applicant Corporation indulged in unfair labour practice covered under item 1(b) of Sch. IV of the Act as the services of the Opponent were terminated not in good faith but in colourable exercise of the employer's right.

10. The learned Advocate for the Applicant has placed reliance on the case of Anand Bihari and others *V/s.* Rajasthan State Road Transport Corporation and another, reported in 1991 I CLR 525 SC, wherein held in Para 8 :—

> " The termination of services of an employee covered by sub clause (c) of Sec. 2(oo) of the Industrial Disputes Act would not amount to retrenchment within the meaning of said section". Hence the termination peruse is not illegal because the provisions of Sec. 25-F of ID Act have not been followed while effecting, it ".

In the instant case, the termination of service is not challenged because of non compliance of Sec. 25-F of ID Act, therefore, the ratio laid down in the above referred case is not applicable to the facts of the present case. Further, the learned Advocate for the Applicant has placed reliance on the case of Blue Star Limited *V/s.* Blue Star Workers Union and Another reported in *1997 II CLR 1018* Bombay, wherein held in Para 6 :—

> "In other words, the Industrial Court or Labour Court can pass the orders as contemplated in clauses (a), (b), (c) of Sec.(1) of Sec. 30 on its finding that such person has engaged in or engaging in any unfair labour practice. The Industrial Court or Labour Court does not possess any power to issue any direction even when it has found that the person named in the complaint has not engaged in is or in not engaging in any unfair labour practice."

In the instant case, the learned Labour Judge has considered the unfair labour practice covered under item 1(b) of Sch. IV of the M.R.T.U. and P.U.L.P. Act, which is in relation to the action not in good faith but in colourable exercise of the employer's right. According to the learned Advocate for the Opponent, it was not necessary at all to terminate the services of the Opponent because he was found medically unfit. But the Applicant Corporation was under an obligation to accommodate the Opponent by giving him an alternative light duty.

11. The reliance is also placed by the learned Advocate for the Applicant on the case of U. P. State Road Transport Corporation *V/s.* Mohd. Ismail and Others reported in *1991 II CLR 132 SC*, wherein held in Para 14 that :—

> "It is within these constraints the Corporation has to exercise its discretion and perform its task."

According to the learned Advocate for the Applicant, for giving an alternative job is the sole discretion of the Corporation and the Opponent cannot claim this relief as of right. Further, the learned Advocate for the Applicant has placed reliance on the case of General Workers Union *V/s.* Sangli Municipal Council, Sangli and others reported in *1984 (48) FLR 411* Bombay, wherein held in Para II that :—

> " There is a difference between an illegal act and an unfair labour practice. What the Complainant under the Act has to prove is an unfair labour practice and not merely that the act is illegal."

I am in agreement with the submission of the learned advocate for the Applicant that the Opponent is under an obligation to prove that the Applicant has engaged in unfair labour practice and not merely the Act is illegal. According to the Opponent, without accommodating him in the service by alloting light duty as an alternate job straightway terminating his services is an unfair labour practice in colourable exercise of the employer's right. The learned Advocate for the Applicant has also placed reliance on the case of Himachal Road Transport Corporation *V/s.* Shri. Dinesh Kumar reported in *1996 II CLR 194 SC* wherein held in Para 8 that :—

> " It is not open to the Tribunal either to direct the appointment of any person to a post or direct the concerned authorities to create a supernumerary post and then appoint a person to such a post. We are of the view that directions given by the Administrative Tribunal in these two appeals are totally unauthorised and illegal. We are therefore, constrained to set aside the orders appealed against. We hereby do so and allow the appeals. There will be no order as to costs."

12. The learned Advocate for the Opponent has given more emphasis to the powers conferred on the Industrial Court by Sec. 44 of the M.R.T.U. and P.U.L.P. Act and during the course of argument submitted that this Court has narrow jurisdiction and cannot re-assess or

re-appreciate the evidence on record. In support of his submissions, he is placing reliance on the following cases :—

(1) M. K. Bhuvaneshwaran *V/s.* Premier Tyres Ltd., (reported in *2001 II CLR 245* Mumbai).

(2) Pest Control of India *V/s.* PPCI Employees All India Union reported in *1994 I CLR 230* Bombay.

(3) Ammunitation Factory Co-op. Credit Society *V/s.* B. R. Ghule reported in *2000 I CLR 806* Bombay.

(4) Kirloskar Cummins Ltd., *V/s.* S. S. Darekar reported in *1997 II 797* Mumbai.

(5) MSRT Corporation *V/s.* Kantras and others reported in *2000 II CLR 865* Bombay and

(6) Gajanan Thakrey *V/s.* MSRT Corporation and others reported in *2000 III CLR 99* Mumbai.

There cannot be dispute about statutory provisions conferring powers upon the Industrial Court under Sec. 44 of the M.R.T.U. and P.U.L.P. Act and within the limited jurisdiction has to travel for finding out in the order challenged any perversity, illegality or arbitrariness. The learned advocate for the Opponent has further placed reliance on the case of M. Paul Antony *V/s.* Bharat Mold Mines Ltd., and another reported in *1999 I CLR 1032 SC,* wherein held in Para 34 that :—

"Where the Appellant is acquitted by a judicial pronouncement with the finding that the "raid and recovery" at the residence of the Appellant were not proved, it would be unjust, unfair and rather oppressive to allow the findings recorded at the *ex-parte* departmental proceedings to stand."

According to the learned Advocate for the Opponent, the termination of services of the Opponent cannot stand as the criminal Court acquitted the Opponent from the criminal charges. By way of reply, the learned Advocate for the Applicant has submitted that the same criteria cannot be made applicable for proving criminal charges and the miscounduct in the departmental proceedings, therefore, the Opponent cannot take advantage of the situation claiming that his termination of service is illegal because he has been acquitted from the criminal charges. Further the learned Advocate for the Opponent has placed reliance on the case of Manoj J. Salvi *V/s.* Special Steel Limited reported in *2000 III CLR 639* Bombay, wherein held in Para 3 that :—

"Having held the management guilty of unfair labour practice and having held that the Petitioner is entitled to reinstatement, there was no justification before the Labour Court to deny the relief to the Petitioner. In order to deny the relief of reinstatement to the Petitioner, the Labour Court with some distorted process of reasoning, has come to conclusion that the relations between the Petitioner and the Management have been proved to be strained".

Supporting the order passed by the learned Labour Judge, the learned Advocate for the Opponent taking help of the ratio laid down in the above referred case and according to him, the relief is rightly granted for reinstatement with continuty in service and with full back wages because the action of the Applicant Corporation of termination of services of the Opponent is declared illegal. The learned Advocate for the Opponent has placed reliance on the case of S. N. Kedate *V/s.* Ceat Tyres of India Limited reported in *2001 III CLR 291* Bombay, wherein held in Para 12 that :—

"The option of the employer was either to decline an alternate posting on the ground that there was in fact no accident or to grant an alternate job subject to the consent of the workman to receive the emoluments attached thereto."

In the instant case, there is no dispute about the accident occurred, but the controversy is of not giving an alternate posting or job allotting light duty to the Opponent though he was declared medically unfit by the Medical Board. The learned Advocate for the Applicant during course of his argument has submitted that there should not be any interference at the hands of the Court because the fact of medical unfitness is the consequence of termination of his service and no question of any unfair labour practice on the part of the Applicant Corporation. The labour and industrial legislations are the social legislations entirely based on the socio economic condition of labour/employees/workers and to safe guard their rights and interests, the legislation has taken care of their rights and interest and impleaded several provisions entirely based on the principles of natural justice and expect from the implementing authorities to give proper and appropriate meaning to the provisions while interpreting the statutory provisions at the time of delivering justice. The employer who is not disputing the fact of accident and when the Opponent is declared medically unfit by the Medical Board to discharge duties as the driver, under such circumstances, the principles of natural justice come into play and without terminating his services, it would have been just, fair and proper on the part of the Applicant Corporation to continue the Opponent in service by alloting him light duty by way of alternate job. Instead of doing this, straightway terminating the services of the Opponent is harsh action which likely to effect, not only to the workman (Opponent) but also to his entire family. The Applicant Corporation has failed to prove perversity, arbitrariness or illegality in the impugned order. In my considered view, the learned Labour Judge has rightly granted the relief while dealing with complaint (ULP) No. 626 of 1997. Keeping in view the principle of natural justice, no interference is called for in the impugned order. Hence, the present revision application is liable to be dismissed as per the order passed below :—

Order

Revision Application (ULP) No. 173 of 2001 is dismissed.

No order as to costs.

Records and proceeding of Complaint (ULP) No. 926 of 1997 be sent to VIIth Labour Court, Mumbai.

P. P. PATIL,
Member,
Industrial Court, Mumbai.

Mumbai,
Dated the 15th September 2003.

K. G. SATHE
Registrar,
Industrial Court, Mumbai.
Dated the 20th September 2003.

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कामगार आयुक्त, मुंबई

कॉमर्स सेंटर, ताडदेव, मुंबई ४०० ०३४, दिनांक ३ ऑक्टोबर २००३

अधिसूचना

क्रमांक औसं/औविअ/प्रसिद्धी/निवाडा/प्र-१३९ /२००३/कार्यासन-७.—ज्याअर्थी औद्योगिक विवाद अधिनियम, १९४७ च्या कलम ३९(ब) चे अंतर्गत प्रदान करण्यात आलेल्या शक्तींचा वापर करून महाराष्ट्र शासनाने आपल्या अधिसूचना क्र. औविअ/१०८०/५८/काम-२, दिनांक १६ डिसेंबर १९८० द्वारे असा निर्देश दिला आहे की, उक्त अधिनियमाच्या कलम १७(१) खाली शासनास वापरता येण्याजोगे अधिकार कामगार आयुक्त, महाराष्ट्र राज्य, मुंबई यांनाही वापरता येतील.

त्याअर्थी, आता वरील नमूद केल्याप्रमाणे, औद्योगिक विवाद अधिनियम, १९४७ च्या कलम १७(१) च्या खालील शाक्तीचा वापर करून कामगार आयुक्त, महाराष्ट्र राज्य, मुंबई हे मे. ट्रायस्टार इंजिनिअरिंग सर्व्हिसेस अॅण्ड कन्सलटन्सी, मुंबई व या आस्थापनेस काम करणारे यांचे औद्योगिक विवादाबाबत शासन आदेश क्र. एडीटी १३९४/२९९४९/सीआर-२१९१/काम-३, दिनांक ९ नोव्हेंबर १९९४ च्या संदर्भात औद्योगिक न्यायालय, मुंबई यांना दिलेला निवाडा क्र. ८९/९४ प्रसिद्ध करीत आहेत.

BEFORE SHRI P. P. PATIL, INDUSTRIAL TRIBUNAL AT MUMBAI

REFERENCE (IT) No. 89 OF 1994.— Adjudication Between M/s. Tristar Marine Engineering Services and Consultancy, Bombay Timber Market, Signal View Avenue, Reay Road, Mumbai 400 010.—*And*—The Workmen employed under them, represented through Sarva Shramik Sangh, "Shramik", 31, Lokmanya Tilak Vasahat Marg No. 3, Dadar. Mumbai 400 014.

In the matter of General Demands.

Appearances.— Mr. B. Menon, Advocate for the First Party Company,
Mr. Mayur Nagle, Advocate for Second Party Union.

Judgment and Award

(Dated 19th July 2003)

1. This is a reference under Sec. 10(*1*)(*d*) of the Industrial Diputes Act, 1947 by Industries, Energy and Labour Department *vide* its order No. ADT 1395/29949/CR-2191/Lab-3, dated 9th November 1994 for adjudication of general demands Nos. 1 to 8 mentioned in the schedule made by the second party workmen represented by Sarva Shramik Sangh.

2. The facts in brief of this reference are as under :—

There was no conciliation between the parties to the present reference before the Conciliation Officer over the charter of demands submitted by the second party union, therefore, it was referred to this Tribunal for adjudication by the Government. There are 8 demands of the second party Union, whcih are relating to the *adhoc* rise in wages and annual increments, Classification of workmen Dearness Allowance, Paid Holidays, Privilege Leave, Casual Leave, Sick Leave, House Rent Allowance, Leave Travel Allowance and all mandatory and other benefits be awarded respectively.

3. The first party Company *viz*. M/s. Tristar Marine Engineering Services and Consultancy (hereinafter referred to as the Company) involved in the work of ship repairs. About 30 employers are engaged by the Company. The Company is paying wages very low to

their workmen and not improving the service conditions of the workmen. The Company is not paying wages as per the Minimum Wages Act though its financial position is sound. The service conditions available to the workmen in the industry in the region have been revised and the workmen working in such industries enjoying better service conditions. The workmen represented by Sarva Shramik Sangh (hereinafter referred to as the Union) is demanding rise of Rs. 500 per month in existing wages, annual increment at the rate of 10% of their total wages. Classification of the workmen, the wages are necessarily to be linked up with the cost of living index declared by the Government of Maharashtra from time to time, 15 days Paid Holidays, in a calender year, instead of 6 days be awarded, as well as Privilege Leave of 30 days in a calendar year, Casual Leave for 7 days in a calender year, Sick Leave for 7 days in a year. House Rent Allowance at the rate of 5% of total wages and Leave Travel Allowance of Rs. 1,000 per annum.

4. In the statement of claim, the Union has stated about Permanency as the demand No. 7 for the workmen, who have completed 6 months of service, but such demand is not referred for adjudication by the Government in its reference order.

5. The Company has filed its Written Statement and raised preliminary objection *vide* application Exh. C-8 to the maintainability of the present reference on the ground that the Central Government is the appropriate Government and therefore, this Court has no jurisdiction. My learned Predecessor was pleased to decide the application Exh. C-8 by his order dated 10th October 2001 and kept the issue of maintainability open while adjudicating the demands in the reference on merits. It is contended by the company that it is a proprietory firm wherein 9 workmen and 5 staff members are working. According to the Company, they are paying wages as per the Minimum Wages Act. It is admitted by the Company that the nature of job of repairing ships on contract basis is carried out. It is denied of engaging 30 workmen for doing such work and the allegations of paying lower wages in comperison of paying wages by the industry in the region. It is a very small firm and their financial condition is not sound thererfore, unable to satisfy the demands exhorbitantly made by the Union. It is admitted by the company that the cost of living indes is increased every year and the Company is also paying minimum wages rise to the workmen 10% of their total wages. It is further contended that the firm is also paying annual increment of 10% of their total wages. It being a small firm in which 9 workmen and 5 staff members enguged who are doing the job of welding. Therefore, they need not to be classified in sepwrate cadre. At present, the company is giving 8 paid Holidays and showing inability to extent the benefit of 15 paid holidays in a year. The company is granting leave with wages to the workmen one day for 20 days of work and the benefits of the ESI scheme. The company denied extending benefit of Casual Leave, Leave Travel Allowance, Sick Leave. According to the company, house rent Allowance is paid by these companies where 50 or workmen are employed. Lastly, it is contended by the Company that the workmen presently working are made permanent who have continuously worked for 240 days in a twelve months, but denied to give effect of award retrospectively.

6. On the basis of the pleadings, my learned Predecessor framed the following Issues *vide* Exh. O-6 :—

Issues.—	*Findings*.—
1. Whether it is proved that the demands raised by the second party workmen / union and referred by the Government for adjudication are just and proper ?	Some demands are proved just and but some are
2. Whether the second party workmen/union are entitled to the demands as claimed.	As per award.
3. Whether the appropriate Government is the Central Government in relation to the second party workmen ?	No.
3. What order and award ?	As per the order.

Reasons

7. In view of the objection raised by the company to the maintainability of the reference, Issue No. (3) is shifting the burden on the company to prove whether the appropriate Government is the Central Government. By application Exh. C-8 filed on 27th February 2001, the company is claiming that this Court has no jurisdiction to entertain this reference as the appropriate government is the Central Government, hence the present reference made by the State Government is not maintainable. There is no dispute that the company is engaged in the business of ship repairs carried out in the Docks of Mumbai Port Trust. The company is placing reliance on the decision in the case of Transport and Dock Workers Union *V/s.* Khemcn Company (Agencies) Pvt. Ltd., and another reported in *1999 I CLR 678 Bombay.* wherein it is held :—

> "The Central Government would be an appropriate Government to make a reference under Sec. 10 of the Act when the dispute is between the management and workers employed in works considered as incidental to or connected with operations in a major port."

The learned Advocate for the company has also placed a reliance on the case of Oyster Marine Inc. *V/s.* Chandrakant R. Ugale and another reported in *2001 I LLJ 710* wherein it is held that :—

> "The appropriate Government in relation to any industrial dispute concerning a major port would be the Central Government and in relation to any other dispute, it would be the State Government."

The learned Advocate for the company has submitted that the activities undertaken by the company are incidental to or connected with the operations in a major port, therefore, the appropriate Government in relation to the present dispute is the Central Government. The learned advocate for the Union has submitted that the wages and annual increments no evidence is led by the company to show that its activities are incidental to or inconnected with the operations in major port. Further, the learned advocate for the Union has submitted that the business of ship repairs does not include in the term of incidental to or connected with operations in major port. No evidence is brought on record by the company and failed to discharge the burden cast upon them by way of Issue No. (3). The nature of activities undertaken by the company *i.e.* ship repairs works in the docks of Mumbai Port Trust on the basis of which the company is claiming that the appropriate Government is the Central Government and hence the present reference is not maintainable as made by the State Government. In the written statement as well as the witness of the company Mr. Dera stated that the company is a proprietory firm. No where it is stated by this witness that the company is an undertaking of the Central Government. The written statement of the company as well as the evidence of their

witness Mr. Dera is silent over the issue of any way that the company is connected with the Central Government. There is no evidence on record to show that the service conditions of the employees engaged by the company are governed and controlled by the Central Government. It is not the case of the company that they doing ship repairs work as per the directions of the Central Government or on the terms and conditions settled between them with the Central Government. How the Central Government has connection with this proprietory firm *i.e.* the company has not made clear by the company. Merly because the company has taken the work of repairing ships in the dock yard of Mumbai Port Trust, that does not mean that their activities are controlled and supervised by the Central Government. No document is placed on record by the company to substantiate their grievance as to how the present reference is not maintainable. The company is a small establishment. The company has claimed and engaging business of ships repairing work having their exclusive supervision and control over their workers (employees). The Central Government cannot be the appropriate Government as they have no control or supervision over the activities of the company. Therefore, the company has failed to prove that this reference is not maintainable. Therefore, I answer the Issue No. (3) in the negative.

8. The Union has submitted the charter of demands. The first demand is relating to *Ad hoc* rise in wages, and increments, classification. The Union is demanding that every workman be granted *ad-hoc* rise of Rs. 500 p.m. in their existing wages with effect from January 1993. This demand includes annual increments and classification. According to the Union, the workman are getting wages as per the minimum wages act fixed for the engineering industry and the annual increments. The demand is for rise in wages for Rs. 500 p.m. and 10% annual increment on the total wages. The company has come with the case of engaging 14 workmen, out of which 9 are workmen and 5 staff members. According to the company, they are paying minimum Rs. 2,100 p.m. salary and maximum Rs. 6,000 p.m. to the staff members and the workmen are getting monthly wages from Rs. 2,000 to 2,300 per month depending on the category of each workmen. The Company is declined to give rise in the wages and the annual increments, including other demands, on the ground that its financial position is not sound. But, they have admitted that the cost of living index is increasing every year and the company is considering this situation, therefore, paying every year rise to the workmen at 10% of their total wages. The company has denied the allogation of paying wages/salary less than the minimum wages. Accroding to the company, they are paying Rs. 2,000 p.m. to Rs. 6,000 p.m. wages/salary to the staff and the workmen, which is not less than the minimum wages or the wages paid by the industry in the region. Further, the company has made a statement to the effect of paying annual increments of 10% of the total wages to each workmen every year and ready to make 10% rise in the annual increment every year. According to the company, only 14 employees are engaged in their firm, 9 workmen and 5 staff members and doing identical nature of work *i.e.* welding job, therefore, the workmen cannot be classified in such small unit. The demand for rise in wages at Rs. 500 p.m. in the existing wage scale made by the Union is quite reasonable, looking to the rise in the cost of living index in Mumbai. The demand for annual increment at the rate of 10% of the total wages to each workman every year is admitted by the company and they have accepted the said demand of the union as stated in para 10 of their Written Statement Exh. C-2. Therefore, I find substance in the demand of wage rise of Rs. 500 p.m. in the existing wage scales and the annual increment at the rate of 10% of the total wages of each workman. I find substance in the stand taken by the company that there is no necessity of classification of the workmen at they required to do similar work of repairing the shops.

9. The demand No. 2 is in respect of dearness allowance. The union is claiming that the wages as fixed by virtue of the demand No. 1 be treated as the base for working class cost of living index at 1000 (1962 serise and every rise of I point over and above 1000) be paid Rs. 1 permonth as compensation with effect from January, 1993. According to the company, the union is claiming dearness allowance exherbitantly. The company submits that it always pays 10% rise on the total consolidated salary, hence looking to the size of the firm as well as on the industry come region basis, payment of dearness allowance deserves to be rejected. According to the Union, for the demand of dearness allowance it is necessary that the wages are linked

with the cost of living index as declared by the Govt. from time to time. Looking to the increase in the cost of living index, the demand No. 2 for dearness allowance is justified. The dearness allowance must be linked with the cost of living. There cannot be a dispute that the cost of living index is increasing day by day and in that view of the matter, the Government of Maharashtra enhanced the dearness allowance from time to time. The workmen are also facing rise in the prices of essential commodities and to meet out their daily expenses, the dearness allowance claimed by them is justified. The company has failed to bring evidence on record to show as to how the demand of dearness allowance should not be considered. Merely because the company is facing the financial difficulty on which ground the request of the union for payment of dearness allowance cannot be ignored. Therefore, the demand of the union for dearness allowance is granted.

10. The demand No. 3 is about paid holidays. The Union has submitted the charter of demand for 15 paid holidays in a year. At present, the workmen are getting 6 paid holidays in a year. In the written statement, the Company has admitted in para 13 that they are giving 8 paid holidays in a year, which are almost all national holidays and shown their inability to grant 15 paid holidays in a year. There is no evidence putforth by the Union to show that 7 paid holidays are necessarily to be granted, though already the workmen are getting 8 paid holidays in a year. I do not find any substance in the demand No. 3 which is towards additional paid holidays and hence this demand is rejected.

11. The demand No. 4 of the Union is in respect of Privilege Leave, Casual Leave and Sick Leave. The Union is demanding privilege leave for 30 days in a year. At present, the workmen are getting privilege leave as provided under the provisions of the Factories Act. The union is demanding accumulation of privilege leave upto 90 days. The demand of the union towards casual leave is for 7 days in a year and sick leave for 7 days in a year and also claiming accumulation of sick leave for 70 days. The Company is at present granting leave with wages to their workmen under the Factories Act *i.e.* one day for 20 days of work and those leave is granted strictly under the provisions of the Factories Act. The Company is not granting any casual leave to the workmen and the reason given for not granting such leave because looking to the size of the firm and its financial position and industry *cum* region basis. Thus, it is clear that the Company is following the provisions of the Factories Act for granting privilege leave and sick leave. The Company is extending the benefits of the ESI scheme to all the workmen eligible for such leave. The provisions of the Factories Act are applicable as per sub-section (*n*) of Sec. 2 of the Factories Act, 1948 :—

> "Factory means any premises including presincts thereof where 10 or more workers are working, or were working on any day of the preceding twelve months and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on.
>
> For computing the number of workers for the pruposes of this clause all the workers in different groups and relays in a day shall be taken into account".

12. Chapter VIII of the Factories Act, deals with annual leave with wages. Annual leave with wages explained by the provisions of Sec. 79 of the Factories Act, which defines :–

> "Every workman who has worked for a period of 240 days or more in a factory during calender year shall be allowed during the subsequent calender year leave with wages for a number of days calculated at the rate of - if an adult, one day for every 20 days of work performed by him during the previous calender year".

Sub-section (*5*) of Sec. 79 says that :—

> "If a worker does not in any one calender year take the whole of the leave allowed to him under sub-section (*1*), (*2*) as the case may be, any leave not taken by him shall be added to leave to be allowed to him in the succeeding calender year.
>
> Provided that the total number of days of leave that may be carried forward to a succeeding year shall not exceed thirty in the case of adult or 40 in the case of child".

The workmen are already getting the benefits of the ESI Act, therefore, the demand of sick leave is strongly resisted by the company. I find substance in the resistance made by the Company, who is declined to extend the benefits of sick leave to the workmen, who are already getting the benefit of the provisions of the ESI Act, 1948, therefore, the demand of sick leave is hereby rejected.

13. The demand No. 5 of the Union is for house rent allowance at the rate of 5% of the total wages. At present, no house rent allowance is being paid to the workmen. According to the Company, the house rent allowance is paid as per the Government Notification by those companies where 50 or more workmen are employed and since only 14 workmen are engaged by the Company, the demand of house Rent Allowance should not be considered. Day by day, accommodation problem, particularly in Mumbai, is increasing, therefore, the workmen or any an dividual facing difficulty for getting accommodation. The workmen who are getting limited wages or salary, accomodation on rent is a serious problem for them. But in the statement of claim, the Union has specifically mentioned that the Government of Maharashtra has enacted minimum house rent allowance at the rate of 5% of the total wages and this enactment is applicable where more than 50 workmen are employed. Therefore, the Union contrary to the notification issued by the Government of Maharashtra cannot claim the house rent allowance and in the result, they are not entitled for grant of house rent allowance.

14. The damnad No. 6 of the Union is about the Leave Travel Allowance at the rate of Rs. 1,000 per annum. The Company has declimed to grant leave travel allowance because of their bad financial condition. The Union has brought on record through their witness Mr. Prajapati that the workmen cannot afford to go to their native place because the Company is not granting the leave travel allowance. The evidence of the company's witness Mr. Dera is silant on the point of leave travel allowance. It has come in the evidence of the company's witness Mr. Dera that the financial position of other companies such as Homa Engineering Company, Diesel Power Engineering Company. Onient Engineering Company cannot be compared as they have possessed licence of dry dock and more than 50 workmen upto the strength of 100 workmen engaged by them. The Union has failed to satisfy the Court that their workmen are entitled to the Leave Travel Allowance at the rate of Rs. 1000 per annum. In absence of sufficient evidence on record, the demand of Leave Travel Allowance can not be granted.

15. In the statement of claim, the Union has mentioned Demand No. 7 regarding Permanency, but in the schedule attached to the order of reference, this demand is not mentioned, therefore, there cannot be any adjudication over such demand, without reference from the Government.

16. Last demand of the Union is for giving retrospective effect to their all demands. As per the facts stated in the statement of claim and the material brought on record through the oral evidence of the company's witness Mr. Dera, this demand is seriously challenged by the Company on the ground that its financial position is not sound to bear such additional financial burden. It is contended in the Written Statement Exh. C-2 that the company is a proprietory firm and the Proprietor is an Engineer himself and if he would have served on the ship as the Chief Engineer, he would have earned more than Rs. 60,000 p.m. But the proprietor of the Company has failed to attain a goal by starting establishment for gaining profits and day by day the financial position of the company is deteriorating. In the evidence of the company's witness Mr. Dera he has stated that at present 7 workmen and 2 Supervisors are working in the establishment. Tha said witness Dera has admitted the fact of extending the benefits of ESI scheme and Provident Fund, to their employees. According to this witness Mr. Dera, the Company is employing the employees on contract basis, but denied the suggestion that the intention of the company of engaging the contract labours is to deprive the legitimate benefit of the workmen for permanency. Though the union through their witness Mr. Prajapati has brought on record that there are about 25 workmen working in the company, but no documentary evidence is made available on record. On the contrary, the witness of the company Mr. Dera has given in his evidence the names of 9 workmen at present working in the company. Therefore, it is difficult to reply on the evidence of the witness Mr. Prajapati examined on behalf of the union that total 25 workmen are engaged by the company.

16. The Company has placed on record the balance sheets for the year 1996-97 and profit and loss account. But those documents or contents thereof are not proved. Merely filing of such documents on record is not sufficient, unless the contents are proved. Moreover, their statement that the financial position of the company is not sound, therefore, legitimate and justified demands of the union cannot be considered is meaning less. Having considered the facts and circumstances of the reference, including the financial condition, if retrospective effect is given for implementation of the award, certainly the company would be put additional financial burden and may be difficult for them to meet out the last demand No. 8 for implementation of the award with retrospective effect. Under such circumstances, it would not be just and proper to give retrospective effect for implementation of the demands, which are granted for implementation from the date of this award.

17. The Union has placed reliance on several case laws in support of their demands and claiming that when there has been rise in the cost of living index in the region, the workmen are entitled for rise in wages scales and necessary to meet the service conditions. The Union has placed reliance on the case of French Motors Company Limited *V/s.* Their workmen, reported in *AIR 1963 Supreme Court 1327.* wherein it is held that :—

> "Generally, adjustments are granted when the scales of wages are fixed for the first time. But, there is nothing in the law to prevent the tribunal from granting adjustments even in cases where previously pay scales were in existence, but that has to be done sparingly taking into consideration the facts and circumstances of each case."

The Union has further placed reliance on the case of Indian Oxygen Limited *V/s.* Its Workmen and others, reported in *1963 II LLJ 83 SC.* wherein it is held that :—

> "While considering the revision of wage scales the concern which was only one of its kind compared with other concerns merely similar to it."

The learned Advocate for the union has submitted that the industry in the region has accepted the demands their workmen of revision in wage scales and also regarding the benefits of the dearness allowance, house rent allowance, leave facilities etc. No doubt, in the evidence of the unions's witness Mr. Prajapati for the union has stated the names of some companies involved similar type of business and the workmen working in the said companies. But his statement is without any support of the document. Despite of this, the legitimates demands are considered in view of the statutory provisions. The union has further placed reliance on the case of workmen of Balmer Lawris *V/s.* Balmer Lawris and Co. Ltd., reported in *1964 I LLJ 380 SC* wherein it is held that :—

> "The Tribunal cannot dispose of the matter by observing that the employer has adopted a particular formula for payment of dearness allowance which has been evolved by Chamber of Commerce."

Further, it is held in supra that :—

> "In dealing with the industrial matters, the industrial adjudication should not normally encourage technical plea and having regard to the facts of the cases are conducted before the Tribunal many times by laymen, the significance or importance of the argument that a particular question was not put to a witness should never be ex-gerated."

In support of the demand of revision of wage scales and dearness allowance, the union is placing reliance on the case of Cinema Theaters *V/s.* Their Workmen reported in *1964 II LLJ 128 SC* wherein it is held that :—

> "Increase in the cost of living index over a course of nine years held a change of circumstances justifying revision of wage scales and dearness allowance."

More emphasis has been given by the learned Advocate for the union to grant revision of wage scales, dearness allowance and other demands in view of the ratio laid down in the case of Patna Electricity Company *V/s.* Their Workmen reported in *1962 I LLJ 148-SC* and also on the case of Sangam Press Limited *V/s.* Their Workmen reported in *1975 II LLJ 126, SC.* wherein held that :—

> "Where minimum wages are fixed, the capacity to pay is not a criteria but where fair wages are paid the capacity to pay is vaild criteria, whcih cannot be ignored."

The learned Advocate for the union has submitted that the stand taken by the company about its financial condition cannot be the criteria for ignoring the demands of the union when the minimum wages are fixed under the law as well as other benefits.

18. Having considered the nature of work, size of the establishment of the company and the demands, which are proved by the union also accepted by law are considered. But the demands, which are not reasonable and justified and also failed to prove by the union with sufficient proof are not taken into consideration. Consequently, therefore, the present refernece is disposed of as per the award passed below :—

Award

1. Reference (IT) No. 89 of 1994 is partly allowed.

2. Demand No. 1 Ad-hoc rise in wages ans increments, Demand No. 2 Dearness Allowance, Demand No. 4 only to the extent of leave with wages of one day for 20 days of work as per the provisions of the Factories Act and Demand No. 5 for House Rent Allowance are hereby granted.

3. Demand No. 1 to the extent of classification; Demand No. 3 paid holidays, Demand No. 4 to the extent of casual leave and sick leave, Demand No. 6 leave travel allowance and Demand No. 8 to give retrospective effect to the wage scales and other benefits are rejected.

4. The company is hereby directed to satisfy the demands granted and extend other benefits, as discussed above, from the date of this award.

5. Award be passed accordingly.

P. P. PATIL,
Member,
Industrial Court, Mumbai.

Mumbai,
Dated the 19th July 2003.

K. G. SATHE,
Secretary,
Industrial Court, Mumbai.
Dated the 28th July 2003.

भि. जा. गजभिये,
कामगार आयुक्त,
महाराष्ट्र राज्य, मुंबई.

———————

IN THE INDUSTRIAL COURT, AT MUMBAI

COMPLAINT (ULP) No. 553 OF 2002—(1) Mumbai Mahanagarpalika Karmachari Sanghatana, Mahapalika Marg, Mumbai 400 001, (2) Anand A. More, 309, Riddhi-Siddhi Apartment, Pakhadi Kharegaon, Kalwa, Thane 400 605—*Complainants—Versus*—(1) Municipal Corporation of Greater Mumbai, Mahapalika Marg, Mumbai 400 001, (2) Standing Committee, Municipal Corporation of Greater Mumbai, Through its Chairman, Having Office at Mahapalika Marg, Mumbai 400 001, (3) Shri. K. C. Shrivastava or his successers, The Municipal Commissioner of Greater Mumbai, Mahapalika Marg, Mumbai 400 001, (4) Smt. Sudha Khire or her successer, Municipal Secretary, Municipal Corporation, Have Greater Mumbai Mahapalika Marg, Mumbai 400 001.—*Respondents.*

In the matter of complaint of unfair labour practices under items 5 and 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act, 1971.

PRESENT.— Shri. P. P. Patil, Member, Industrial Court, Mumbai.

Appearances.— Mr. Prakash Devdas, Advocate for the Complainants,
Mrs. K. K. Seraan Advocate, for the Respondents.

Judgment and Order

(Dated 24th September 2003)

1. The complaint is under items 5 and 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act, 1971. The Complainants are claiming that the Respondents indulged in unfair labour practices covered under items 5 and 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act by showing favour to one set of group of employees regardless of merits while implementing the policy of promotion and failure to consider Complainant No. 2 for promotion to the post of Senior Secretarial Assistant.

2. The facts in brief of the complaint are as under :—

Complainant No. 1 is union registered under the Trade Unions Act, 1926 and has been recognised by Respondent No. 3 to represent the employees of Respondent No. 1 Corporation. Complainant No. 2 is an employee presently working as Junior Secretarial Assistant under Respondent No. 4 who is a member of the Complainant No. 1 union. Respondent No. 1 is the Corporation constituted under the provisions of Mumbai Municipal Corporation Act, 1988. Respondent No. 2 is the Standing Committee of the Corporation under whose control and supervision, the Complainant No. 2 is working. Respondent No. 3 is the Chief Executive of the Corporation and Respondent No. 4 is the Head of Department of the Municipal Secretariate. Complainant No. 2 is working with the Respondent No. 1 Corporation, since 21st September 1983 as Jr. Secretarial Assistant in the scale of Rs. 4170-6830. The Complainant No. 2 was entitled for promotion to the post of Sr. Secretarial Assistant in 25% reserved posts for Jr. Secretarial Assistants (hereinafter referred to as "the JSA"). As per the Municipal Commissioner's Circular dated 27th April 1986, the JSA who has put in continuous service of 15 years is entitled to the post of Sr. Secretarial Assistant (hereinafter referred to as 'the SSA') in the scale of Rs. 5490-7870 on the basis of the seniority *cum* merits at the ratio of 3:1. Merit is decided by written test conducted by Respondent No. 4 and 25% posts are reserved for these who do not pass the test, but they are promoted on the basis of seniority in the post of JSA, Respondent No. 4 had given promotions to the junior employees without considering the claim of Complainant No. 2. Complainant No. 2 is a scheduled caste employee possessing post graduate digree in Arts (M.A.) of Mumbai University. Complainant No. 2 has also presented programmes of recitals of poems, stories, books, review from Akashwani and Doordarshan and the Maharashtra State Literature Cultural Board has published him poems of the Complainant No. 2, Respondent No. 4 promoted the employees who do not have merits by showing them favour. Thus, the action of Respondent No. 4 covers under item 5 of Sch. IV of the M.R.T.U. and P.U.L.P. Act and the Respondents Nos. 2 and 3 as they did not take any cognizance to the representations made by the Complainant No. 2 and failed to consider to grant promotion to the Complainant No. 2 also engaged in unfair labour practice covered under items 5 and 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act.

3. The Complainant No. 2 was not communicated any adverse remarks. Service of the Complainant No. 2 is governed by the Model Standing Orders. Respondent No. 4 intentionally refused leave of the Complainant No. 2. Complainant No. 2 is entitled for leave for the period of his absence. No chargesheet was served upon the Complainant No. 2 and no departmental enquiry was held against him for his absentism.

4. The Complainant No. 2 was denied promotion from 1996 although vacancies existed. Thus, the grave prejudice is caused. The employees of the Corporation are governed by the provisions of Industrial Disputes Act, 1947. The Respondents have not given any notice of change as required under Sec. 9-A of ID Act for altering the rules of promotion. The action of the Respondents is clearly in breach of various circulars, guidelines issued by the Respondent No. 3.

5. The Respondents have filed their affidavit in reply at Exh. C-1 wherein denied the allegations of engaging in any unfair labour practices covered under items 5 and 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act. It is contended by the Respondents that the allegations in the complaint are frivolous and mischievous in nature. It is contended in Para 3 of Exh. C-1 that the affidavit in reply is filed for limited purpose for oppossing the interim relief application and the Respondents are reserving their right to file detail written statement at the appropriate stage. The Respondents have denied the allegations of showing favour to other employees while implementing the policy promotion. It is contended by the Respondents that the Complainant No. 2 was appointed as clerk with effect from 21st September 1983 and thereafter he was promoted to the post of JSA, with effect from 11th January 1989 *vide* Standing Committee resolution of the same date. Further contended by the Respondents that though the Complainant No. 2 has put in continuous service of more than 15 years, but from the office records it seems that the Complainant No. 2 is very irregular in respect of attending the office and habitual to enjoy leave without prior permission. The averment is also made to the effect that more than 25 memos were issued to the Complainant No. 2 on account of his late attendance and forming habit to proceed on leave frequently. According to the Respondents, the proposal regarding the decision to be taken in respect of promotion of Complainant No. 2 to the post of SSA was put up before the Standing Committee and the Standing Committee by its resolution dated 7th February 2002 had concluded not to consider the Complainant No. 2 for his promotion to the said post. The Respondents have contended that there are 33 posts of SSA in their office out of which 8 posts are reserved for non qualified canidates under the policy of 25% reservation (in the ratio of 3:1) as per the Municipal Commissioner's circular dated 27th November 1986. Out of 33 posts, 5 vacant posts are reserved for non qualified candidates who are likely to be filled in accordance with the Standing Committee resolution dated 12th July 2002. The Respondents have contended that it was merely a temporary working arrangement for want of qualified candidates. It is admitted by the Respondents that the appointments of 7 junior employees, who have passed the departmental examinations in June, 2001 and December, 2001, continued as SSA and who had not passed the departmental examinations were reverted back to their original posts. Further it is mentioned by the Respondents in their written statement about 4 junior employees to the Complainant No. 2 are likely to be appointed as SSA under the policy of 25% reservation for non qualified candidates in accordance with the Standing Committee resolution dated 12th July 2002.

6. According to the Respondents, promotion is purely an administrative decision depend upon the past service record of the concerned candidate and the past service record of the Complainant No. 2 was full of leave without prior sanction, (unauthorised absence). The Respondents have further contended that the promotion of 18 employees junior to Complainant No. 2 was merely a temperary working arrangement for want of qualified candidates for taking into account the past service record and the performance. The appointments were made subject to the condition of passing the departmental examination.

7. On the basis of the pleadings of the partiesm, my learned prodecesser was pleased to frame following issues to which I have answered as under :—

Issues.—	*Findings.*—
1. Does the Complainants prove that the Respondents are guilty for the unfair labour practices under items 5 and 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act, 1971 ?	Yes.
2. Are the Complainants entitled to any relief/reliefs ?	Yes.
3. What orders?	Complaint is allowed.

Reasons

7. At the outset, there is no dispute about initial appointment of Complainant No. 2 as clerk and thereafter was promoted to the post of JSA. The grievance of the Complainant No. 2 is that denial of his promotion as SSA though eligible for the said promotion. According to the Respondents, the Complainant would have been SSA either by way of seniority availing benefit of reservation for backward class candidates if he had appeared in the departmental examination conducted in the year 1990 and would have been declared successful. But the Complainant No. 2 did not appear for the said departmental examination. Complainant No. 2 is claiming promotion to the post of SSA being non qualified candidate and seniormost employee in the clerical grade. Promotion seems to have been denied because the Complainant No. 2 was very irregular in his attendance and habitual to enjoy the leave beyond the permissible leave. Willingness was sought from all clerical cadre employees to fill up the post of SSA because 17 posts of the said grade were vacant on the establishment of the Yards Committee and the Complainant No. 2 had shown his willingness, but it was not considered by the Respondents. The departmental examination was held in the year June, 2001 but the Complainant No. 2 did not appear for said examination. The non qualified candidates who are promoted subject to availability of qualified candidates and who could not pass the said departmental examination were reverted back to their original posts. According to the Complainant No. 2, he is entitled to the promotion to the post of SSA from 25% posts reserved for non qualified employees.

8. The Respondents have come with two fold defence on the basis of which denied the promotion, firstly the Complainant No. 2 had formed habit to proceed on leave frequently without intimation and remained absent from duty and secondly, he has not passed the departmental examination. Let us take the stock of oral and documentary evidence for appreciation. The Complainant has examined himself and according to his version, promotion to the post of SSA is given as per the seniority and non qualified employees who have not passed the departmental examination, the said posts are reserved of 25% of the total number of promotional posts. The Complainant No. 2 is claiming that he should have been promoted as the SSA in the year 2000 because 4 junior employees to him viz. (1) Haridas Wasale, (2) S. K. Pawar, (3) Railkar and (4) Smt. Mantri were promoted on the said posts in the year . . . . . *vide* Exhs. U-15 to U-20 were sent by the Complainant No. 2 to the Respondents with a request to grant him promotion, but no appropriate stops were taken by the Respondents. The proposal for promotions *vide* Exh. U-13 was sent to the Standing Committee. In the cross examination, the Complainant No. 2 has admitted that he is claiming promotion under the reserved category which is prescribed 25% and the minimum qualification for the post of SSA is 15 years experience or 3:1 ratio as per the circular Exh. C-4. The Respondents have brought in the cross examination of the Complainant No. 2 that in the year 2000, 6 posts of SSA were for non qualified employees, under 25% reservation policy and 4 SSA who were not qualified candidates working on these posts, who are at Sr. Nos. 26 to 29 in the seniority list Exh. C-3 since February, 2000. The Respondents have brought explanation in the cross examination of the Complainant No. 2 as to why he had taken leave and could not obtain prior sanction because of illness of his mother. The Complainant No. 2 has accepted in his evidence about receipt of memos regarding casual leave from the Respondents.

9. The Respondents have examined their witness Mr. Shrikant Satvalekar, who made, a statement on oath that for non qualified SSA atleast 15 years experience is required and for qualified SSA passing of departmental examination and 5 years experience to the post of clerk is the minimum qualification. It has come in the evidence of Mr. Satavalekar that non qualified candidates were appointed on the posts of SSA subject to passing of the departmental examinations and when the qualified candidates were made available, the non qualified candidates were reverted back to their original posts. Further, witness Mr. Satavalekar has admitted in his evidence about performance of Complainant No. 2 on the post of clerk was very good, but he was not regular in attending his duty, therefore, he was served with memos but no action was taken against the Complainant No. 2. In the cross examination, witness Mr. Satavalekar has admitted the fact that as per the rule, 25% of total number of posts of SSA are available for promotion from the cadre of clerks. Further the said witness has admitted that there are 33 posts of SSA out of which 8 posts are reserved for non qualified clerks and JSA who have not passed the departmental examination. Further witness Mr. Satavalekar has admitted in his cross examination that Complainant No. 2 is the seniormost amongst non qualified employees, who was due for promotion to the post of SSA in August, 2001 but the Complainant No. 2 was not considered for promotion though he made several representations

to that effect. Witness Mr. Satavalekar has also admitted that no enquiry was conducted against the Complainant No. 2 for alleged absentism and no adverse remarks since last 5 years is mentioned in the service book of Complainant No. 2. Thus, it is clear on the basis of the admissions given by the Respondents' witness Mr. Satavalekar that 8 posts were reserved for non qualified clerks and JSA for promotions to the posts of SSA who have not passed departmental examination. On the basis of the admission given by the witness Mr. Satavalekar, the learned Advocate for Complainant No. 2 has submitted that the condition for promotion to the post of SSA on passing departmental examination is not necessary.

10. The learned Advocate for the Respondents has given more emphasis to the point of absentism of the Complainant No. 2 and frequently enjoying the leave. Though the allegations are made against the Complainant No. 2 of forming habit to proceed on leave without prior sanction or confirmation, whether the leave was sanctioned or not, but it is abandant clear from the evidence of the witness of the Respondent Mr. Satavalekar that no chargesheet was served upon the Complainant No. 2 and no enquiry was held against him, therefore, it is difficult to hold that the Complainant had formed habit to proceed on leave without prior sanction or remaining absent from duty with an intention to cause inconvenience to the Respondents. The Respondents after closing oral evidence and when the matter was fixed for arguments, filed xerox copy of service book of the Complainant No. 2, but the entries atleast in respect of leave noted in the service book are not proved. More producing the document on record without proving the content's therein is meaning less.

11. The learned Advocate for the Respondents has placed reliance on the case of Falimar Rangras Sanjeeva Rao *V/s.* Oriental Insurance Company Limited and Others reported in *2000 I CLR Bombay,* wherein held in Para 24 that —

> "In case of merit-*cum*-seniority, merits being equal seniority will tilt the scale. However, as seen above, it being a case of selection post where merit *cum* suitability-*cum*-seniority is the criteria, if the Petitioner is left out, we do not see any reason to interfere with this action of the Respondents."

In the instant case, there is no question of granting promotion of Complainant No. 2 for the selection post, therefore, ratio laid down in the above referred case has no assistance to the defence taken by the Respondents. Further, the learned Advocate for the Respondents has placed reliance on the case of Chandra Prakash Tiwari *V/s.* Shakuntala Shukla and others reported in *2002 (3) LLG 873 SC* wherein hold in Para 40 that :—

> "The failure on the part of the Selection Committee to meet during a particular year would not dispense with the requirement of preparing the select list for that year. If for any reason the Selection Committee is not able to meet during a particular year, the Committee when it meets next, whould while making the selection, prepare a seperate list for each year keeping in view the number of vacancies in that year after considering State Civil Service Officers who were eligible and fell within the zone of consideration for selection in that year."

Further, reliance is placed by the learned Advocate for the Respondents on the case of Bharatkumar Chimanlal Chauhan *V/s.* Nuclear Power Corporation and others reported in *2000 LAB IC 1521 Gujrat,* wherein held in Para 6 that :—

> "Merely accelerating the place of promotional avehues in case of more superior consistant performers, than not to superior performers cannot be said to be unreasonable or arbitrary criterian in operating the merit criterian for selecting the best candidates for scientific and technical staff of the Department of Atomic Energy."

The learned Advocate for the Respondents is also placing reliance on the case of V. Jagannadha Rao *V/s.* State of A. P. and others reported in *2002 (2) LFR 512 S. C.* wherein held in Para 14 that —

> "Not withstanding our aforesaid conclusion, it would be in the interest of the administration to have a channel of promotion for every service, so as to avoid stagnation at a particular level subject however to the condition that the incumbents of service are otherwise qualified to shoulder the responsibilities of the higher promotional post."

The Respondents have not made it clear as to which criteria they are following for implementation of the policy of promotions in various grades/categories of employees. They have brought evidence only to the respect of as qualified and non qualified employees working in the cadre of clerks or JSA how they are entitled for promotion to the post of SSA.

12. Reliance is also placed by the learned Advocate for the Respondents on the case of Shivaji Deoji Sawant *V/s.* Maharashtra State Electricity Board and others reported in *2002 II CLR 892 Bombay,* wherein held in Para 8 that ;

> "What is contemplated by all these decisions is that the uncommunicates remarks should not be used for denying the promotion, but that is not the case with the Petitioner when he seeks promotion as Assistant Accountant. It will be seen that if 5 posts are available and 15 candidates are called before the Selection Committee to consider the selection of 5 persons from out of them and the Selection Committee observes that two of the 15 candidates have excellant record, three would have very good record and the rest have good record. Nobody has adverse remarks. Selection by Selection Committed of the person who were excellant and very good record give preference to those who have good record, cannot be said to be denial of promotion on the basis of uncommunicated adverse remarks."

I am in agreement with the submissions made by the learned Advocate for the Respondents that only on the point that if an employer has to select for promotion two candidates out of 15, certainly give weightage and preference to the candidates who have excellent record. But it is no so in the present case.

13. During the course of arguments, the learned advocate for the Complainants tried to convince the Court as to how the Respondents have engaged in unfair labour practices covered under items 5 and 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act by ignoring the promotion of Complainant No. 2 and granting promotions to junior employees. Witness for the Respondents Mr. Satavalekar has admitted the rule of 25% reservation of posts of SSA for non qualified JSA, therefore, the Complainant No. 2 is claiming that when there are no adverse remarks, no chargesheet was served upon the Complainant No. 2 and no enquiry was initiated against him, under such circumstances, the promotion should have been given to him on the date when the junior employees are promoted and also entitled for monetory benefits with retrospective effect. Complainants are claiming that of engaging in unfair labour practices on the part of the Respondents covered under items 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act as their said action is in violation of the model standing orders and the rules. The learned Advocate for the Complainants has placed reliance on the case of APS Star Indsutries Limited *V/s.* Star Textiles Engineering Employees Union reported in *1997 I CLR 473 Bombay*, wherein held in Para 2 that —

> "To read item 9 in any manner other than as set out above would be to do, violence to its language. To read item 9 as suggesting that there would be no failure if there was inability to implement would be to read into if the words "without good cause" and that would be impermissible."

Further, the learned Advocate for the Complainants has placed reliance on the case of Madhav K. Kirtikar *V/s.* Bank of India reported in *1997 I CLR 475 Bombay,* wherein held in Para 3 that —

> "Thus, on consideration, it appears that Petitioner was not granted promotion while he was in service because of latches and fault of the Respondents. However, he was promoted after retirement in the year 1996 with effect from 15th June 1988 but denied monetory benefits. For such laches, Petitioner cannot be made to suffer in any manner."

Further reliance is placed by the learned Advocate for the Complainants on the case of M. Rangi Reddy *V/s.* A. P. Transco Limited, Hyderabad, reported in *2002 IV LLN 901,* wherein held in Para 13 that —

> "Normally in a case where the denial of promotion of an employee is found to be not lawful, the matter has to be considered by the competent authority afresh. In this case, the DPC has found the Petitioner fit to be promoted. The place of the Petitioner in the seniority list is not in dispute. It is not denied that several officers included in the list dated 30th September 1999, who were juniors to the Petitioner, were also promoted. The only basis as pleaded in the counter affidavit as well as in the proceedings, dated 30th September 1999 (sic. 18th August 2001) is about the allegations communicated by the ACB to the Respondents. In as much as that ground was found to be contrary to the regulations framed by the Respondents themeselves, there does not exist any hurdle in the matter of promoting the Petitioner which was long overdue."

The denial of promotion to the Complainant No. 2 is on two counts already discussed above and at the cost of repition also mentioned here, firstly his frequast absentism and secondly not passing of the departmental examination. Witness for the Respondents Mr. Satavelekar has admitted in clear terms that as per rule, 25% of total number of posts of SSA are available by way of promotion of clerks and JSA, for which passing of departmental examination is not a condition precedent. There is no document placed on record by the Respondents to show that passing of departmental examination is a condition precement for promotion of employees working in the cadre of clerks of JSA. Merely because the Complainant No. 2 had taken the leaves or remained absent from duty cannot be the ground for denial of promotion, unless it is proved that the absentism was wilful or proceeded on leave without any reason. In fact, the Respondents should have served chargesheet upon the Complainant No. 2 and get it proved as to whether the absence of the Complainant No. 2 was wilful, deliberate and intentionally not obtaining prior sanction. Without this exercise, I find no substance in the stand taken by the Respondents because of the Complainant No. 2 remained absent from duty was not considered for his promotion.

14. Admittedly, an employee cannot claim promotion as of right, it being domin of employer. But the employer cannot unreasonable exercise his powers and debar any employee from granting promotion without any substance. In the instant case, sufficient material is brought on record to show that the Complainant No. 2 was reserving for promotion for the post of SSA, but he was not considered by the Respondents at appropriate time. No rebuttal evidence is brought on record by the Respondents to show juniors to Complainant No. 2 are not considered for promotion. Without sufficient reason, if employer grants permission to junior employees with an intention to disgress or humiliate the senior employees, certainly such action on the part of the Respondents/employer should be depricated. Having been considered the oral and documentary evidence in totality, this Court is constrain to take view to direct the Respondents to consider the present Complainant No. 2 for his promotion to the post of Sr. Secretarial Assistant. In the result, the present complaint deserves to be allowed as per the order passed below :—

Order

1. Complaint (ULP) No. 553 of 2002 is allowed.

2. It is declared that the Respondents have engaged in unfair labour practices covered under items 5 and 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act, 1971 by giving promotions to the junior employees and not considering the promotion of the Complainant No. 2 for the post of Senior Secretarial Assistant.

3. The Respondents shall consider the Complainant No. 2 for promotion to the post of Senior Secretarial Assistant, if he found fit as per the rules.

4. No order as to costs.

P. P. PATIL,
Member,
Industrial Court, Mumbai.

Mumbai,
Dated the 24th September 2003.

S. R. ADAV,
Registrar,
Industrial Court, Mumbai.
Dated the 29th September 2003.

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IN THE INDUSTRIAL COURT, AT MUMBAI

APPEAL (IC) No. 22 of 2001.—The General Manager, The BEST Undertaking, BEST House, Mumbai 400 001.—*Appellant—Versus*—Shri Akhtarali Muzaffarali Mir, Akhurli Road, Hanuman Nagar, Near Muslim Kabarastan, Masjid Chowk, Kandivali East, Mumbai 400 001.—*Respondent.*

In the matter of appeal under Sec. 84 of BIR Act, 1946, against the order dated 27th February 2001 passed by 5th Labour Court, Mumbai, in Application (BIR) No. 24 of 1998.

PRESENT.— Shri P. P. Patil, Member, Industrial Court, Mumbai.

Appearances.— Mr. R. G. Hegde, Advocate for Appellant.
Mr. S. A. Khanolkar, Advocate for Respondent.

Judgment and Order

(Dated 25th September 2003)

The Appellant, General Manager of BEST Undertaking is challenging the judgement and order dated 27th February 2001 passed by 5th Labour Court, Mumbai, in Application (BIR) No. 24 of 1998 allowing the said application partly and directed the Appellant to reinstate the Respondent with continuity of service.

1. The facts in brief of the appeal are as under :—

The Respondent was chargesheeted for absentism without permission as per standing order 20(f). It was alleged against the Respondent that he remained absent from duty for about 20 days from January 1995 to December 1995. Enquiry was initiated against the Respondent. The enquiry was challenged by the Respondent on the grounds that it was not conducted in fair and proper manner. According to the Respondent, the findings of the enquiry officer are perverse. The stand of the Appellant before the Labour Court was that the application itself was not maintainable as the Respondent come to be dismissed after domestic enquiry wherein proved misconduct against the Respondent of remaining absent without permission as per standing order 20 (f). The say of the Appellant was that the enquiry initiated against the Respondent was based on the principles of natural justice and the findings of the trying officer are as per the material and evidence, therefore, not necessary to interfere with the order of dismissal from service.

2. After having been heard the parties, the learned Labour Judge was pleased to allow the application partly directing the Appellant to reinstate the Respondent with continuity of service, but denied him back wages by order dated 27th February 2001 which is impugned in this appeal.

3. Heard the learned Advocates for the Appellant and the Respondent

4. The following points arise for my determination :—

Points	*Findings*
1. Whether the Appellant had proved that the order dated 27th February 2001 passed by 5th Labour Court, Mumbai in application (BIR) No. 24/1998 is illegal, unjustified and suffers with perversity, therefore, liable to be quashed and set aside ?	No.
2. What orders?	Appeal is dismissed.

Reasons

5. Undisputedly, the Respondent was in employment of the Appellant working as Bus Conductor who came to be dismissed from service for the charge of habitual absence. The charges levelled against the Respondent are of remaining absent from duty for 20 days from January 1995 to December 1995. While parting with Application (BIR) No. 24/1998, the learned Labour Judge was pleased to hold that the enquiry conducted against the Respondent was

legal, fair and proper and the findings of the enquiry officer are not perverse. Therefore, the impugned order is assailed by the Appellant on the ground that once held that the enquiry was fair and proper and the findings of the enquiry officer are not perverse, the learned Labour Judge by interferring with the order of punishment came to a wrong conclusion. The learned Advocate for the Appellant has streneously argued that no proper explanation was given by the learned labour Judge for interferring with the order of punishment. According to the Appellant, the discretion exercised by the learned Labour Judge is not just and judicious, therefore, necessary to interfere with the erronous findings given by the learned Labour Judge while interferring with the order of punishment.

6. Admittedly, the parties have filed a joint purshis *vide* Exh. CU-1 before the learned Labour Judge thereby declined to lead oral evidence. Therefore, the material before the learned Labour Judge was for consideration the evidence recorded in the enquiry and the enquiry proceedings, including past service record of the Respondent. During the enquiry, the statement of Smt. Sophiya Tadvi who was maintaining the leave record (clerk) recorded and from the said witness brought material about balance leave of the Respondent, tendering leave applications, leave balance on account of medical ground to the credit of the Respondent. In the statement of the Respondent before the enquiry officer has given explanation and according to him, the domestic problem and illness was the reason for not attending the duty. For proving about his illness produced medical certificate. In the statement, the Respondent has mentioned that the leave was balanced and was credited to his account. After having been considered the oral and documentary evidence made available by the parties, the learned Labour Judge was pleased to hold that the enquiry initiated against the Respondent was based on the principles of natural justice and the finding of the enquiry was given in accordance with the material and evidence.

7. The learned Advocate for the Appellant has placed reliance on the case of B. C. Chaturvedi V/s. Union of India and others reported in *1996 I CLR 389 SC.* wherein held in Para 18 that —

> "A review of the above legal position would establish that the disciplinary authority and on appeal the Appellate authority being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with discretion to impose appropriate punishment keeping in view the manitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the Appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/Appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

On the basis of the ratio laid down in the above referred case, the learned Advocate for the Appellant tried to convince the Court that the interference in the order of punishment at the hands of the learned Labour Judge was not proper, because the misconduct was proved against the Respondent and looking to his past service record, the punishment imposed was the adequate. Further reliance is placed by the learned Advocate for the Appellant on the case of Brihanmumbai Municipal Corporation *V/s.* The General Secretary, BEST Workers Union reported in *1998 II CLR 1031 Bombay,* wherein held in Para 4 that —

> "The Courts below failed to see that this is chronic case of absentism and past leniency had failed to produce any result from the said Respondent. It cannot be gain, said that the BEST Undertaking is plying buses in the city of Bombay and it is an essential service and irregular attendance on the part of its drivers affects the services causing hardships to the travelling public. In these circumstances, the Labour Court as well as the Industrial Court were not justified in interferring with the punishment of dismissal imposed by the competent authority."

According to the Appellant, earlier to this application, leniency was shown to the Respondent for about 4 times while awarding punishments for identical misconduct, therefore the punishment of dismissal was the proper punishment, for an employee (Respondent) who was very much irregular in his attendance and formed habit to remain absent from duty without permission. Reliance is also placed by the learned Advocate for the Appellant on the case of M. D. Kawade and another *V/s.* Mahindra Engg. and Chemicals Products Ltd., and another. Reported in *2000 I CLR 545 Bombay,* wherein held in para 10 that —

> "The workman himself has become a workshop owner and naturally would not like to be a workman back again and I am sure that he would not tolerate any such absentee workman in his shop too. A workman must be always "at work" and not "away from work". That should be out "work culture". The Petitioner was more away from work than at work. There is no reason to interfere with the Awards of the Labour Court, nor with order of punishments. The writ petition is dismissed. Rule is discharged. No order as to costs. C. C. of the order is expedited."

Admittedly, due to persistent absence of an employee from duty, the administration is likely to be suffered seriously. Therefore, under what circumstances the employee proceeded on leave is the material issue to be seen. If an employee in compelling circumstances forces to proceed on leave can be termed as an exceptional circumstance. In the instant case, the Respondent was claiming that he was ill and the medical certificate to that effect was produced, therefore, under compelling circumstances he was persistently requesting the Appellant for leave. This may be the reason for interference with the order of punishment at the hands of the learned Labour Judge.

8. The learned Advocate for the Respondent during course of his arguments trying to demonstrate as to how the interference at the hands of the learned Labour Judge was justified, particularly considering the extreme punishment imposed by the Appellant. No counter appeal for challenging the impugned order filed by the Respondent still the learned Advocate for the Respondent canvassed his argument on the point that the normal rule is once the dismissal is set aside, the workman is entitled to reinstatement with continuity of service and back wages, but the learned Labour Judge was pleased to reject the request of the Respondent for grant of back wages, which should have been considered under the fitness of the circumstances of the appeal and to support his contention placing reliance on the case of Municipal Corporation of Greater Bombay *V/s.* Sopan Yeshwant Mohite and others reported in *1996 II CLR 250 Bombay,* wherein held in para 7 —

> "There is no dispute that the normal rule is that once the dismissal is set aside, the workman has to be reinstated with continuity in service and full back wages. The Labour Court in its own discretion ordered reinstatement with continuity in service with 50% back wages. The discretion used by the Labour Court is not found to be unjust, unwarranted or unfair by the Industrial Tribunal."

During course of the arguments, the learned Advocate for the Respondent made submission that there was no occasion of remaining absent deliberately or intentionally. He has pointed out the total absence of 20 days during the period from January 1995 to December 1995 not taken at once but as and when required. In short, the learned advocate for the Respondent tried to show the *bonafide* of the Respondent and there was no intention at all to cause loss to the Appellant for disturbance in their administration. He has placed reliance on the case of Malkiat Singh *V/s.* State of Punjab and others reported in *1996 I CLR 997 SC,* wherein held in para 3 that —

> "The explanation offered for the absence on third occasion was that since his wife's delivery certain complication had arisen, he had to attend to his wife and so he could not present. The medical certificate in that behalf was produced. In view of the medical certificate, it cannot be said that he has deliberately absented himself from duty. On the previous two occasions, the absence for one day and in another year for one night cannot be considered to be regular absence so as to reach the conclusion that he had not prove his efficiency. It is true that discipline is required to be maintained. However, absence may sometimes be inevitable."

The learned Advocate for the Respondent has given more emphasis to the rules and regulations for the employees of the Appellant on the basis of which he is trying to satisfy the Court as to how the Respondent was badly in need of leave as suffering from illness and to that effect the medical certificate was produced. The gist of the arguments of the learned Advocate for the Respondent at the stage of concluding the matter was about the punishment of dismissal imposed on the Respondent. According to him, an opportunity should have been given to the Respondent to improve. Instead of depriving him from getting bread, the punishment of dismissal is no doubt causing economic death of an employee/workmen it being the extreme punishment. While imposing it, the nature of misconduct and past service record of employee plays very important role. In the instant matter, 20 days absence of workman/employee during 12 months that too in a compelling cirucmstances because he was not keeping well and to that effect medical certificate was produced, therefore, I am in agreement with the submission made by the learned Advocate for the Respondent employee that no error or illegality is committed by the learned Labour Judge while interferring with the punishment of dismissal. In the concluding para, the learned Labour Judge has observed that the Respondent has not stated anything about gainful employment to consider the case of absentism alleged against him depriving the Respondent from getting entire back wages is sufficient punishment, therefore, held that the Respondent is not entitled for back wages. The Respondent has not seperately challenged this finding. But while arguing his case, the learned Advocate for the Respondent tried to demonstrate and pointed out that the normal rule is that once the reinstatement is granted with continuity in service, it follows with back wages and for deviation from this normal rule, no proper explanation is given. The Respondent was reluctant to enter the witness box and declined to lead oral evidence. Ultimately, placing reliance on the statement given by him during the enquiry proceedings evidence and documents during enquiry. The duty was cast upon the Respondent to prove independently as to how he is entitled for back wages. Without such evidence, the learned Labour Judge has rightly declined to grant the relief of back wages. This Court does not find any error, illegality or perversity in the impugned order, therefore, the present Appeal deserves to be dismissed as per the order passed below —

Order

1. Appeal (IC) No. 22 of 2001 is dismissed.
2. No order as to costs.

P. P. PATIL,
Member,
Industrial Court, Mumbai.

Mumbai,
Dated the 25th September 2003.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai,
Dated the 30th September 2003.

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